Filed 6/4/03 Elrod v. Costco CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

DANIEL ELROD, Plaintiff and Appellant, v. COSTCO WHOLESALE CORPORATION et al., Defendants and Respondents.	B159303 (Los Angeles County Super. Ct. No. BC207303)

APPEAL from a judgment of the Superior Court of Los Angeles County, Jane L. Johnson, Judge. Affirmed.

Terran T. Steinhart for Plaintiff and Appellant.

Sheppard, Mullin, Richter & Hampton, Tara L. Wilcox, Mary P. Snyder and William V. Whelan for Defendants and Respondents.

Plaintiff filed this action against his former employer, alleging that he was subjected to adverse working conditions in retaliation for testifying that his employer and supervisor had engaged in race discrimination. The trial court granted the employer's motion for summary judgment.

We affirm the judgment because, as a matter of law, plaintiff failed to file a timely administrative charge under the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.), did not suffer an adverse employment action during the period covered by the charge, and was not constructively discharged.

I

BACKGROUND

We accept as true the following facts and reasonable inferences supported by the evidence submitted by plaintiff in opposition to the summary judgment motion. (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 178–179.)

In July 1993, while working as an employee of Costco in Lancaster, California, plaintiff Daniel Elrod was struck by a forklift, causing blunt trauma to his left lower abdomen and serious nerve damage in his left thigh.

In September 1995, a neurologist, Lancelot Alexander, M.D., issued a "neurological reexamination" report, stating that Elrod had numbness and pain in the left lower abdomen and pain radiating down the upper left anterior and medial thigh. Dr. Alexander diagnosed Elrod as having "left ilioinguinal neuropathy with neuralgic pain." The report noted that Elrod suffered pain daily, sometimes severe. The pain increased if Elrod engaged in bending or twisting at the waist or extending the trunk at the hips.

Elrod was taking Nortriptyline, Tegretol, and Relafen daily, but attempts at medicinal management of the pain had not been successful. In his report, Dr. Alexander noted, "I plan to have the patient resume work, light duty, beginning 9/25/95. He will be precluded from doing any heavy lifting of objects greater than 20 pounds in weight, frequent bending or stooping or twisting at the waist. He is able to stand for relatively prolonged periods as well as to sit." Dr. Alexander wrote a note to Costco, dated

October 2, 1995, listing Elrod's work restrictions, which included heavy pulling and pushing.

On October 3, 1995, Elrod returned to Costco and commenced work as a member service representative at the front door of the store. He gave Dr. Alexander's note to Gary Cole, the warehouse manager, and they discussed Elrod's work restrictions.

In March 1997, Elrod testified in a deposition, supporting the allegations in a civil action brought by a coworker, John Valerio, who alleged that Costco and Cole had discriminated against him based on race. Two months later, in May 1997, Cole transferred Elrod from the member service position to the bakery, where he would work as a cake decorator. His pay and benefits remained the same. Elrod did not appear to mind leaving the member service position. He testified that it "was basically a boring job. [¶] . . . [¶] Standing for eight hours [a] day." And "[t]here was no stimulation, no growth, no advancement. Nothing." When Cole told him about the transfer, Elrod believed that Cole was retaliating against him for testifying in the *Valerio* case.

On May 8, 1997 — after Elrod learned about the transfer to the bakery but before it took effect — Elrod consulted with William Dillin, M.D., a spine surgeon. Dr. Dillin concluded that Elrod was suffering from femoral neuritis and completed a "work status" form stating, "disability precluding heavy lifting." The form listed other *possible* restrictions — no bending, no squatting, no kneeling, no lifting above a specified weight — but none of those was checked. Elrod gave the form to an employee in human resources.

At his deposition in the present case, taken in January and February 2000, Elrod testified that the accident has caused, and continues to cause, pain every day. Even walking hurts. The pain is especially severe if he does any bending, stooping, squatting, pushing, or pulling. If he stands, the pain starts immediately but he can endure the pain for about two hours. In Elrod's own words, "everything I do in life now is pain and fatigue . . . ."

When Elrod was transferred to the bakery, his days off changed from Sunday-Monday to Monday-Tuesday — a change he did not mind. For awhile, his shift was changed by one-half hour.

Elrod quickly learned that the bakery job required frequent bending, twisting, and stooping. He also had to lift, pull, and push heavy objects. On a daily basis, he had to slide his work table in order to sweep under it. Elrod immediately complained to the manager of the bakery, John Barnes, that his work restrictions precluded him from performing those tasks. Elrod raised this issue with Barnes at least five times, the last being on August 31, 1997. Even though Barnes did nothing in response to Elrod's complaints, Elrod never sought a transfer to a different job or department. As stated in Elrod's opening brief, "At the time of his transfer to the bakery, Elrod had been made aware by Cole that it was a permanent transfer, and that Cole would not make any other job available to Elrod at the store."

From May 1997 to January 1998, Elrod told Barnes on a weekly basis that the work was painful. When a new manager, Rodney Turner, was transferred to the bakery in January 1998, Elrod also complained to him on a weekly basis that the job was causing him pain. Before Turner became the manager, Elrod and Turner had a good working relationship. Turner complimented Elrod on his work, saying that Elrod made cakes "just like an artist."

To obtain some of the supplies used in making cakes, such as cake boxes, the decorators, including Elrod, climbed a ladder to a storage area and carried the items down on their shoulders. The storage area at the top of the ladder was known as "the steel." Some of the items came in 30-pound boxes. On one occasion, Elrod's leg gave out, and he slipped three steps on the ladder.

Elrod asked Barnes to bring the items down from the steel and place them on the ground level. Elrod did not tell Barnes that he was unable to use the ladder. Rather, Elrod said it was "nice to have [the supplies] down." Barnes kept the items on ground level for two weeks. After the second week, Barnes said he was too busy to do it. Elrod started climbing the ladder again.

Elrod also discussed the issue with the assistant manager, Penny, saying that it was "more productive" to have the supplies on ground level. Elrod did not tell Penny that using the ladder was inconsistent with his job restrictions. Penny said she was going to "work on trying to get things more organized."

When Turner became manager of the bakery, in January 1998, the cake decorators, including Elrod, requested that he keep the cake boxes down in the middle of the bakery on a pallet. That request was based on all of the decorators' concerns about convenience, efficiency, and productivity. Turner said he would "work on it."

During the time Elrod worked in the bakery, he believed that he was treated unfairly in several respects. He was told to remove his radio from the work area because Costco was concerned that employees were bringing their personal radios to work and then taking home Costco radios from the warehouse. He was blamed for a mistake in cake orders when another employee was at fault. He was criticized for misspelling a word on a cake. Turner scheduled Elrod to work on a day in the middle of his vacation, but Elrod had left town without getting approval for the time off. Cole threatened all of the decorators with a productivity test to see how many cakes each employee could make in one hour. On one occasion, Elrod spent four hours working with other employees to move tables so that a new floor could be installed in the bakery.

Elrod had difficulty getting paid for a day he appeared at court to testify in the *Valerio* matter. The proceeding had been continued to a later date. For some reason, Cole learned about the continuance but Elrod did not. Eventually Elrod was paid.

On March 19, 1998, Elrod testified before the Workers' Compensation Appeals Board in support of Valerio's benefits claim, which accused Costco and Cole of race discrimination. The next day, the manager of the bakery, Turner, saw Elrod talking to other decorators during work hours. Turner took Elrod aside and told him to keep his mouth shut and not to talk to anybody because every time Elrod started talking, his hands stopped moving. Turner told Elrod to do his job and stop talking.

Elrod became angry and said he wanted to talk to the assistant manager, Penny. Turner threatened to fire Elrod for insubordination if he left his work station. Elrod

believed he was being singled out because of his testimony in the workers' compensation proceeding. He also thought Turner was discriminating against him because none of the other employees were told to stop talking. After five minutes, Turner told Elrod he could talk to Penny.

Elrod went to the management office. He told Penny about a number of problems: his time schedule, having to work on a day in the middle of his vacation, and Turner's instructions to stop talking. Penny seemed to agree with Elrod and said that Turner was new at the bakery and did not know what he was doing.

While Elrod was talking to Penny, Cole walked in and asked Elrod, "Did you get to put in your word yesterday in court?" Elrod responded in the affirmative, adding, "You can't talk about those things and discuss those matters of court with me." Cole said that it was his warehouse, and he could do whatever he wanted. He called Elrod a liar and accused him of being delusional and paranoid. Together, Penny and Cole told Elrod that it was okay for him to talk while working as long as his talking did not interfere with his performance.

Later that same day, Elrod had an anxiety attack and left work early. He never returned. He has since been on a leave of absence that he attributes to work stress.

On August 31, 1998, Elrod filed a charge of retaliation with the California Department of Fair Employment and Housing (DFEH). He alleged that Costco had retaliated against him for testifying in the *Valerio* proceedings.

On March 18, 1999, Elrod filed this action against Costco, Cole, and Turner (collectively Costco), alleging causes of action under the FEHA for retaliation, disability harassment, disability discrimination, racial discrimination, racial harassment, and a failure to prevent discrimination and retaliation. He also alleged a violation of the federal Americans with Disabilities Act (42 U.S.C. § 12101 et seq.).

Costco moved for summary judgment. Elrod filed opposition papers. The trial court granted the motion. Judgment was duly entered. Elrod filed a timely appeal.

II

DISCUSSION

A motion for summary judgment must be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).)

"'A defendant seeking summary judgment has met the burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action cannot be established [or that there is a complete defense to that cause of action]. . . . Once the defendant's burden is met, the burden shifts to the plaintiff to show that a triable issue of fact exists as to that cause of action. . . . In reviewing the propriety of a summary judgment, the appellate court independently reviews the record that was before the trial court. . . . We must determine whether the facts as shown by the parties give rise to a triable issue of material fact. . . . In making this determination, the moving party's affidavits are strictly construed while those of the opposing party are liberally construed.'" (*Jackson v. County of Los Angeles*, *supra*, 60 Cal.App.4th at pp. 178–179, citations omitted; accord, *Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 850–852.)

Although Elrod alleged several causes of action under the FEHA and one cause of action under the Americans with Disabilities Act — all of which were summarily adjudicated — he appeals from the judgment as to the retaliation claim only. Accordingly, we do not consider whether Costco's motion was properly granted as to any other claim.[1]

The FEHA makes it unlawful "[f]or any employer . . . to discharge, expel, or otherwise discriminate against any person [(1)] because the person has opposed any

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[1] Elrod asks us to judicially notice (1) the record in John Valerio's civil action against Costco and (2) Princess Diana's death on August 31, 1997. Elrod does not explain why we should do so, and we therefore deny the request.

practices forbidden under this [Act] or [(2)] because the person has filed a complaint, testified, or assisted in any proceeding under this [Act]." (Gov. Code, § 12940, subd. (h).)

In a retaliation case, the law "require[s] that (1) the plaintiff establish a prima facie case of retaliation, (2) the defendant articulate a legitimate nonretaliatory explanation for its acts, and (3) the plaintiff show that the defendant's proffered explanation is merely a pretext for the illegal [conduct]. . . . [¶] To establish a prima facie case, the plaintiff must show that he engaged in a protected activity, [the] employer subjected him to adverse employment action, and there is a causal link between the protected activity and the employer's action. . . . [¶] . . . [¶] Pretext may . . . be inferred from the timing of the company's . . . decision, by the identity of the person making the decision, and by the . . . employee's job performance before [the retaliation]." (*Flait v. North American Watch Corp.* (1992) 3 Cal.App.4th 467, 476–479, citations omitted; accord, *Addy v. Bliss & Glennon* (1996) 44 Cal.App.4th 205, 215–217.)

"Under the FEHA, the employee must exhaust the administrative remedy provided by the statute by filing a complaint with the Department of Fair Employment and Housing (Department) and must obtain from the Department a notice of right to sue in order to be entitled to file a civil action in court based on violations of the FEHA. . . . The timely filing of an administrative complaint is a prerequisite to the bringing of a civil action for damages under the FEHA. . . . [¶] As for the applicable limitation period, the FEHA provides that no complaint for any violation of its provisions may be filed with the Department '*after* the expiration of one year from the date upon which the alleged *unlawful practice* or refusal to cooperate *occurred*,' with an exception for delayed discovery not relevant here." (*Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 492, citations omitted, italics in original.)

Costco contends that the only arguable unlawful practice was Elrod's transfer to the bakery, which occurred in May 1997, and that because Elrod's claim was not filed with the DFEH until August 31, 1998, it was untimely, more specifically, three months late. Elrod counters that the claim was timely filed under the continuing violation

doctrine. He bases that argument, in part, on the theory that he was harassed throughout his employment in the bakery and was constructively discharged.

"There is an equitable exception to the one-year period that is known as the continuing violation doctrine." (*Accardi v. Superior Court* (1993) 17 Cal.App.4th 341, 349, disapproved on another point in *Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 813–823.) "A continuing violation may be established by demonstrating 'a company wide policy or practice' or 'a series of related acts against a single individual.' . . . '. . . "[A] systematic policy of discrimination is actionable even if some or all of the events evidencing its inception occurred prior to the limitations period. The reason is that the continuing system of discrimination operates against the employee and violates his or her rights up to a point in time that falls within the applicable limitations period. Such continuing violations are most likely to occur in the matter of placements or promotions."' . . . The plaintiff must demonstrate that at least one act occurred within the filing period and that 'the harassment is "more than the occurrence of isolated or sporadic acts of intentional discrimination." . . . The relevant distinction is between the occurrence of isolated, intermittent acts of discrimination and a persistent, on-going pattern.'" (*Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 64, citations omitted.)

"In attempting to show a continuing violation through 'a series of related acts against a single individual . . . "[the] question . . . boils down to whether sufficient evidence supports a determination that the 'alleged discriminatory acts are related closely enough to constitute a continuing violation.'"' . . . Many of the cases of this type of continuing violation explain that the 'continuing violation doctrine "is premised on the equitable notion that the statute of limitations should not begin to run until a reasonable person would be aware that his or her rights have been violated."' . . . 'Thus, a continuing violation claim will likely fail if the plaintiff knew, or through the exercise of reasonable diligence would have known, [he] was being discriminated against at the time the earlier events occurred.' . . . [¶] Cases alleging a hostile work environment due to racial or sexual harassment are often found to come within the continuing violations framework."

(*Morgan v. Regents of University of California*, *supra*, 88 Cal.App.4th at p. 65, citations omitted; accord, *National R.R. Passenger Corp. v. Morgan* (2002) 536 U.S. 101 [122 S.Ct. 2061, 2072–2073].)

As our Supreme Court recently explained: "[A]n employer's persistent failure to reasonably accommodate a disability, or to eliminate a hostile work environment targeting a disabled employee, is a continuing violation if the employer's unlawful actions are (1) sufficiently similar in kind — recognizing . . . that similar kinds of unlawful employer conduct, such as acts of harassment or failures to reasonably accommodate disability, may take a number of different forms . . . ; (2) have occurred with reasonable frequency; (3) and have not acquired a degree of permanence. . . . But . . . 'permanence' in the context of an ongoing process of accommodation of disability, or ongoing disability harassment, should properly be understood to mean the following: that an employer's statements and actions make clear to a reasonable employee that any further efforts at informal conciliation to obtain reasonable accommodation or end harassment will be futile.

"Thus, when an employer engages in a continuing course of unlawful conduct under the FEHA by refusing reasonable accommodation of a disabled employee or engaging in disability harassment, and this course of conduct does not constitute a constructive discharge, the statute of limitations begins to run, not necessarily when the employee first believes that his or her rights may have been violated, but rather, *either* when the course of conduct is brought to an end, as by the employer's cessation of such conduct or by the employee's resignation, *or* when the employee is on notice that further efforts to end the unlawful conduct will be in vain. Accordingly, an employer who is confronted with an employee seeking accommodation of disability or relief from disability harassment may assert control over its legal relationship with the employee either by accommodating the employee's requests, or by making clear to the employee in a definitive manner that it will not be granting any such requests, thereby commencing the running of the statute of limitations." (*Richards v. CH2M Hill, Inc.*, *supra*, 26 Cal.4th at p. 823, citations omitted, italics in original.)

At this point, it bears repeating that the only cause of action before us is a retaliation claim under the FEHA. The question on appeal is whether Costco subjected Elrod to an adverse employment action in retaliation for Elrod's testimony in the *Valerio* matter. This appeal does not raise any issues concerning whether Costco adequately accommodated Elrod's disability or whether he was harassed because of his disability.

A. The Job Transfer

We conclude that the limitations period under the FEHA bars Elrod from challenging his transfer to the bakery. At his deposition, Elrod testified that, at the time of the transfer, he believed Cole was penalizing him for testifying in the *Valerio* case. Elrod understood from day one that the transfer was permanent and that Cole would not permit him to work elsewhere in the warehouse.

The transfer was a discrete event — not an ongoing course of conduct — that commenced the running of the limitations period upon the effective date of the transfer. (See *Morgan v. Regents of University of California*, *supra*, 88 Cal.App.4th at pp. 65–67; *Mullins v. Rockwell Internat. Corp.* (1997) 15 Cal.4th 731.) As the United States Supreme Court has stated in applying federal antidiscrimination statutes:

"[D]iscrete [retaliatory] acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges. Each discrete [retaliatory] act starts a new clock for filing charges alleging that act. The charge, therefore, must be filed within the [limitations] time period after the discrete [retaliatory] act occurred. . . . [¶] . . . [¶]

"Discrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify. Each incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable 'unlawful employment practice.' [An employee] can only file a charge to cover discrete acts that 'occurred' within the appropriate time period. While [the plaintiff in this case] alleged that he suffered from numerous discriminatory and retaliatory acts from the date that he was hired through . . . the date that he was fired, only incidents that took place within the timely filing period

are actionable." (*National R.R. Passenger Corp. v. Morgan*, *supra*, 122 S.Ct. at pp. 2072–2073.)[2]

Elrod was transferred to the bakery in May 1997. He did not file a charge with the DFEH until August 1998. To the extent his retaliation claim is based on the transfer, it is barred by the one-year limitations period.

B. Harassment

Elrod contends that when he worked in the bakery, Costco "harassed" him (subjected him to a "hostile work environment") by failing to take his work restrictions into account. Under the FEHA, the limitations period starts to run on a claim of harassment when an employer's statements make clear to a reasonable employee that his efforts to end the alleged unlawful conduct would be futile — that the harassment has acquired "permanence." Unlike a claim alleging a discrete retaliatory act, a claim of harassment is based on an ongoing course of conduct. (*Richards v. CH2M Hill, Inc.*, *supra*, 26 Cal.4th at pp. 821–823.)

During his first week at the bakery, Elrod learned that the job entailed the types of activity that his physician had prohibited. Cole knew about Elrod's work restrictions when he made the transfer decision. Upon the effective date of the transfer, Elrod told the bakery manager about his work restrictions and the pain he was suffering. On a weekly basis, Elrod told the manager that he was in pain. The manager did nothing in response to the complaints.

A reasonable employee in Elrod's position would have realized within the first month, at the latest, that any attempts to end the "harassment" were futile. Elrod argues to the contrary, stating that his hope for an end to the "harassment" was renewed in January 1998, when the bakery manager (Barnes) arranged for the cake boxes and other supplies to be on ground level instead of up in the steel. But Elrod testified at his

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[2] In applying the FEHA, state courts often rely on federal decisions applying comparable federal laws. (See *Reno v. Baird* (1998) 18 Cal.4th 640, 647.)

deposition that his request about the location of the supplies was made on behalf of all of the decorators and was motivated by their concerns about convenience, efficiency, and productivity, not his work restrictions. Elrod talked to Penny about this issue and did not mention any restrictions.

C. "Intermediate" Retaliatory Acts

"[A]n adverse employment action is not limited to 'ultimate' employment acts, such as a specific hiring, firing, demotion, or failure to promote decision. The legislative purpose underlying FEHA's prohibition against retaliation is to prevent employers from deterring employees from asserting good faith discrimination complaints, and the use of intermediate retaliatory actions may certainly have this effect. But . . . to be actionable, the retaliation must result in a substantial adverse change in the terms and conditions of the plaintiff's employment. A change that is merely contrary to the employee's interests or not to the employee's liking is insufficient. Requiring an employee to prove a substantial adverse job effect 'guards against both "judicial micromanagement of business practices," . . . and frivolous suits over insignificant slights.' . . . Absent this threshold showing, courts will be thrust into the role of personnel officers, becoming entangled in every conceivable form of employee job dissatisfaction. While the Legislature was understandably concerned with the chilling effect of employer retaliatory actions and mandated that FEHA provisions be interpreted broadly to prevent unlawful discrimination, it could not have intended to provide employees a remedy for any possible slight resulting from the filing of a discrimination complaint. [¶] . . . [A]n action constitutes actionable retaliation only if it ha[s] a substantial and material adverse effect on the terms and conditions of the plaintiff's employment. Although an employer's 'intermediate' action may be retaliatory, it does not form the basis of an FEHA retaliation claim unless it satisfies this test." (*Akers v. County of San Diego* (2002) 95 Cal.App.4th 1441, 1455, citation omitted.)

"The inquiry as to whether an employment action is adverse requires a case-by-case determination based upon objective evidence. . . . '[W]ork places are rarely idyllic retreats, and the mere fact that an employee is displeased by an employer's act or

omission does not elevate that act or omission to the level of a materially adverse employment action.' . . . If every minor change in working conditions or trivial action were a materially adverse action then any 'action that an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit.' . . . [¶] . . . [¶]

"'. . . A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation.' . . . The employment action must be both detrimental and substantial." (*Thomas v. Department of Corrections* (2000) 77 Cal.App.4th 507, 510–511, citations omitted.) Employer conduct that is a one-time event, such as a paycheck dispute over one day of work, is not likely to constitute an adverse employment action. (*Id.* at p. 512.)

Elrod's complaints about one-time incidents — the removal of his radio, criticism for misspelling a word, being scheduled to work on a day during his vacation, being blamed one time for another employee's mistake, and having difficulty in getting paid for a day he spent at court waiting to testify in the *Valerio* case (even though the proceeding had been continued to a later date) — are not sufficiently adverse to create a disputed issue of fact regarding his claim of retaliatory conduct.[3]

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[3] In *Yanowitz v. L'Oreal USA, Inc.* (2003) 106 Cal.App.4th 1036, a retaliation case brought under the FEHA, the court rejected the requirement that an adverse employment action be material and substantial. (*Id.* at pp. 1059–1064.) Instead, the court applied a "deterrence" test under which "'an action is cognizable as an adverse employment action if it is reasonably likely to deter employees from engaging in protected activity.'" (*Id.* at p. 1061.) Assuming that the deterrence test applies, we would still conclude that Costco's treatment of Elrod was not sufficiently adverse. Elrod virtually concedes the point. In his reply brief, Elrod describes the foregoing events as "minor irritations" and "light-weight" issues.

D. Constructive Discharge

"In order to establish a constructive discharge, an employee must plead and prove, by the usual preponderance of the evidence standard, that the employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize that a reasonable person in the employee's position would be compelled to resign." (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1251 (*Turner*); accord, *Thompson v. Tracor Flight Systems, Inc.* (2001) 86 Cal.App.4th 1156, 1166–1167.)

"The conditions giving rise to the resignation must be sufficiently extraordinary and egregious to overcome the normal motivation of a competent, diligent, and reasonable employee to remain on the job to earn a livelihood and to serve his or her employer. The proper focus is on whether the resignation was coerced, not whether it was simply one rational option for the employee." (*Turner*, *supra*, 7 Cal.4th at p. 1246.)

"[A]dverse working conditions must be unusually 'aggravated' or amount to a 'continuous pattern' before the situation will be deemed intolerable. In general, '[s]ingle, trivial, or isolated acts of [misconduct] are insufficient' to support a constructive discharge claim. . . . Moreover, a poor performance rating or a demotion, even when accompanied by reduction in pay, does not by itself trigger a constructive discharge." (*Turner*, *supra*, 7 Cal.4th at p. 1247, fns. omitted.)

"'"'An employee may not be unreasonably sensitive to his [or her] working environment. . . . Every job has its frustrations, challenges, and disappointments; these inhere in the nature of work. An employee is protected from . . . unreasonably harsh conditions, in excess of those faced by his [or her] co-workers. He [or she] is not, however, guaranteed a working environment free of stress.'"'" (*Turner*, *supra*, 7 Cal.4th at p. 1247.)

Elrod emphasizes that, on his last day of work, which was the day after he testified at Valerio's workers' compensation hearing, the bakery manager, Turner, told him to "keep his mouth shut." Elrod's deposition testimony shows that Turner's directive was not retaliatory. Rather, Turner was concerned that Elrod had difficulty talking and

working at the same time. According to Turner, when Elrod talked, he gestured with his hands and stopped working on the cakes. Elrod claimed that he was talking to the other decorators about how to process the cake orders for that day and was therefore working at the time.

Five minutes after Turner told Elrod not to talk, Turner gave Elrod permission to see Penny, the assistant manager. Elrod told Penny what had happened. While Elrod was talking to Penny, Cole walked in. Cole made derogatory remarks about Elrod's testimony in the *Valerio* case. *Thereafter*, Penny and Cole told Elrod that he could talk as long as he worked while doing so. Elrod returned to the bakery, had an anxiety attack, and left Costco, never to return.

Giving Elrod every benefit of the doubt and viewing the cumulative conduct and statements of Cole, Barnes, and Turner over time — from Elrod's transfer to the bakery to Turner's and Cole's remarks on the last day of Elrod's employment — we conclude that, as a matter of law, Elrod's "working conditions were [not] so intolerable . . . at the time of [his] resignation that a reasonable employer would realize that a reasonable person in [Elrod's] position would be compelled to resign." (*Turner*, *supra*, 7 Cal.4th at p. 1251.)

Indeed, on Elrod's last day, Cole and Penny told him exactly what he wanted to hear — that he could talk while working — effectively overruling Turner's instructions. Cole's derogatory remarks, which preceded the favorable advice, were not so severe as to coerce Elrod's resignation. No one is "guaranteed a working environment free of stress." (*Turner*, *supra*, 7 Cal.4th at p. 1247.) Accordingly, the trial court properly granted summary judgment.

III

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

MALLANO, J.

We concur:

ORTEGA, Acting P. J.

VOGEL (MIRIAM A.), J.